Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

KHADIR GHANAYEM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the prosecution failed, as a matter of law, to present evidence to support the jury verdict that Khadir Ghanayem was predisposed, independent of the government's acts of inducement and beyond a reasonable doubt, to violate the law of conspiracy to possess cocaine with intent to distribute.

LIST OF ALL PARTIES TO THE PROCEEDING
IN THE COURT WHOSE JUDGMENT IS SOUGHT
TO BE REVIEWED

1. Solicitor General
   United States Department of Justice
   Washington, D.C. 20530

2. Khadir Ghanayem
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No:

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1995

KHADIR GHANAYEM, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Seventh Circuit

Khadir Ghanayem respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Appendix B) is reported at 48 Fd.3d 1438. The opinion of the district court (Appendix A) is reported at 845 F.Supp. 556.

JURISDICTION

The court of appeals entered its judgment on February 28, 1995 (Appendix B) and following the entry of a petition for rehearing and suggestion for rehearing en banc, the court of appeals denied the petition on April 18, 1995 (Appendix C). The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1).

STATUTES AND RULES INVOLVED

Title 21, United States Code, Section 841 -- (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -- (1) to manufacture, distribute or dispense, a controlled substance.

Title 21, United States Code, Section 846 -- Any person who attempts or conspires to commit any offense defined in this sub-

chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Title 18, United States Code, Section 2 -- (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. **(b)** Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Federal Rule of Criminal Procedure 29(c) -- (See Appendix D)

STATEMENT OF THE CASE

Khadir Ghanayem and was charged in a two-count indictment with conspiring to possess with intent to distribute cocaine and attempting to possess with the intent to

distribute cocaine. 21 U.S.C. Sections 841(a)(1) and 846 and 18 U.S.C. Section 2. Mr. Ghanayem defended on the ground that DEA Agent William Grant entrapped him into committing the crime through a number of meetings, telephone calls and hiring the defendant at his auto repair business to do work on the agent's car. The jury found Mr. Ghanayem not guilty of attempting to possess cocaine with the intent to distribute, but guilty of conspiracy to possess with intent to distribute cocaine. Subsequently, the district court granted Ghanayem's Rule 29(c) motion ruling the government failed to produce evidence to establish petitioner was predisposed to participate in a drug conspiracy, as required to overcome his entrapment defense (Appendix A, pages A-38 to A-40). The court of appeals reversed the district court's judgment of acquittal, reinstated

the jury verdict and remanded for sentencing (Appendix B), on the principal basis that petitioner's "character and reputation predisposed him to being involved in a drug transaction". (Appendix B, page B-12). Neither Seventh Circuit precedent nor settled decisions of this court allow such a dubious justification to find predisposition in an entrapment case. Following remandment, the defendant was sentenced to five years in the federal penitentiary, the mandatory minimum sentence required to Title 21, United States Code, Section 841(b)(1)(B).

Jurisdiction of the District Court

The district court's jurisdiction was based on Title 18, United States Code, Section 3231, which grants original and exclusive jurisdiction in the federal district courts covering all criminal offenses

against the laws of the United States.

Jurisdiction of the Court of Appeals

The jurisdiction of the court of appeals for the Seventh Circuit was based on Title 28, United States Code, Section 1291, which confers jurisdiction on the courts of appeals over final judgments of the district courts. Title 18, United States Code, Section 3731, also permits the government to appeal an order of the district court dismissing an indictment after verdict.

TRIAL EVIDENCE

On March 30, 1993, DEA Agent Grant and a cooperating individual ("CI") went to the 1-2-3 Club on Diversey Avenue in Chicago. Grant had been told that it was a known "hangout" for criminals. There, the CI instead saw Ghanayem, an auto-repairman and cousin of the principle target of the investigation Mazen Shunnarah. The CI waved and

walked over to talk to Ghanayem. A conversation took place, during which Ghanayem handed the CI an auto body shop business card and told him to give him a call if he ever needed auto repair work. (Appendix A, pages A-16 to A-18)

The next contact with Ghanayem was on April 22, 1993. It took place at George's Auto Body Shop in Chicago, where Grant and the CI went to see him. Grant had a 1991 Mercedes 300SL convertible and asked Ghanayem if he could repair its windshield. (Appendix A, page A-19) At that time the CI and Grant steered the conversation to drugs, asking Ghanayem if he knew anyone who would want to buy five kilos. According to Grant, Ghanayem responded that he knew somebody who might be interested. (Appendix A, page A-20)

Ghanayem however testified that after discussing the repair of Grant's automobile,

Grant turned the conversation to drugs, to which Khadir Ghanayem responded that he does not buy, sell, or do drugs. (Appendix A, page A-21)

Following that meeting, the defendant did not contact Mazen Shunnarah, the CI nor Grant. So, on May 7, 1993, Grant went back to the body shop. Ghanayem discussed the repair of Grant's vehicle, but Grant kept leading the conversation to drugs. Grant asked Ghanayem if he knew anyone else besides his cousin "that might be interested", to which Ghanayem replied, "Not off hand, only one person. You... this is the only person that I know." (Appendix A, page A-27)

The tape-recorded conversation of May 7, 1993 between Ghaneyem and agent Grant revealed -- in contradiction to Grant's testimony that the defendant exhibited readiness to engage in a drug deal -- that

the defendant was neither experienced, willing nor interested in Grant's proposal. (Appendix A-30) In clear contradiction to Grant's characterization of defendant's alleged predisposition, the tape recordings established that Grant persistently returned the discussion to drugs while Ghanayem ultimately went along with Grant after having been overcome by Grant's enticement. (Appendix A, pages A-31 to A-32)

In the May 12 and May 20, 1993 meetings, Ghanayem repeatedly discussed auto repairs while Grant brought up the subject of drugs. By May 27, 1993, Ghanayem eventually spoke with his cousin Shunnarah, price and quantity were discussed and in subsequent meetings, Ghanayem discussed the possibility of future deals and requested a $1,000.00 commission. (Appendix A, pages A-32 to A-33) Ultimately, no transaction ever

took place between Grant and Shunnarah, but Khadir Ghanayem was prosecuted and convicted of conspiracy to possess with intent to distribute cocaine while acquitted by the jury of attempted possession of cocaine.

Twenty-nine year old Ghanayem took the stand in his own defense. His education consists of one year of high school, after which he took up trade school and received a certificate in mechanics. He'd been an auto mechanic for ten years. He drove a damaged automobile that he purchased for $3,000.00. He had $2,000-$3,000 in the bank, owned no real estate.

When Ghanayem was confronted at trial with tape recordings and transcripts, the following colloquy took place:

> Q (Assistant United State's Attorney): Why did you arrange this meeting between Shunnarah and Agent Grant?

A (Defendant): Because Mr. Grant came by my shop several times and asked me to call ... I kept ignoring him and didn't want to do it. And then, finally, I called for him too, I figured I would make one phone call. He was bringing me the car to be fixed, and I figured I would make one call for him (Tr. 493) * * * I did this as -- I did this for Mr. Grant because he kept bothering me with it. I didn't want to call Mazen Shunnarah in the first place. I didn't want to be involved on drug deals, but he kept coming by, and kept coming by and pursuing" (Tr. 505)

REASONS FOR GRANTING THE PETITION

THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED DUE TO THE SPECIAL AND IMPORTANT REASON THAT THE COURT OF APPEALS HAS RENDERED A DECISION IN DIRECT CONFLICT WITH ITS OWN PRECEDENT (United States v. Hollingsworth, 27 F.3d 1196 (7th Cir. en banc. 1994) AND IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT ON THE LAW OF ENTRAPMENT (Jacobson v. United States, 112 S.Ct. 1535 (1992))

The prosecution failed, as a matter of law, to present any evidence to support to support the jury verdict that Khadir Ghanayem was predisposed, independent of the

government's acts of inducement and beyond a reasonable doubt, to violate the law of the conspiracy to possess cocaine with intent to distribute. The district court therefore granted Ghanayem's post-trial Rule 29(c) motion, relying on established precedent of this court and Seventh Circuit law. (Appendix A, pages A-35 to A-36). However, in reversing the district court's judgment of acquittal -- on the basis that there was "evidence of predisposition" -- the court of appeals emasculated its own precedent in United States v. Hollingsworth, 27 F.3d 1196 (7th Cir., 1994), ignored this court's decision in Jacobson v. United States, 112 S.Ct. 1535 (1992), upon its finding that: "the government proffered evidence that Ghanayem's character and reputation predis-- posed him to being involved in a drug trans- action." (Appendix B, page B-12) There was

no such evidence in the record. (See Appendix A, page 38) The district court correctly observed, "The government presented no evidence that Ghanayem had ever been involved in, arrested for, or convicted of any drug offense -- or any other offense * * * No evidence was presented to suggest that Ghanayem ever had anything to do with illegal drug trafficking." (Appendix A, page 11)

In the war on drugs, "it is well settled that the fact that officers or employees of the government merely afford opportunities or facilities for the commission of the offenses does not defeat the prosecution" United States vs. Russell, 411 U.S. 423, 435 - 436, 93 S.Ct. 1637, 36 L.Ed.2d 366 1973. Government agents, however, may not originate a criminal design, implant in an innocent person the disposition to commit

a criminal act, and then induce commission of the crime so that the government may prosecute. Sorrells vs. United States, 287 U.S. 435 at 442, 53 S.Ct. 210 at 212, 77 L.Ed. 413 (1932). Such is the case here. Both this court and the United States Seventh Circuit Court of Appeals have ruled that when the government's quest for criminal convictions leads to the arrest, prosecution and conviction of an otherwise law-abiding citizen who, if left alone, would have never run afoul of the law, courts will intervene. Jacobson vs. United States, 112 S.Ct.at 1543 and United States vs. Hollingsworth, 27 F. 3d 1196 (7th Cir. 1994). Intervene even where juries have deliberated on contested entrapment evidence, deliberated with entrapment instruc-- tions and rendered verdicts of guilt. In the present case, the court of appeals

opinion ignores this precedent. Worse, it circumvents the law by finding predisposi-- tion evidence that never existed in the record of evidence.

Ghanayem defended the charge on the ground that DEA Agent Grant entrapped him. This was achieved through a series of repeated acts of going to the defendant's auto repair shop, engaging him to do lucrative repair work on the agent's expensive automobile, and constantly urging him to be the intermediary between the defendant's drug dealing cousin Shunnarah and Grant. After Ghanayem was acquitted of attempted possession of cocaine, but found guilty of con-- spiracy, the district court reviewed the record of evidence and granted defendant's Rule 29 motion finding that a rational jury could not have found Khadir Ghanayem guilty. Following the appropriate standard applica-

able to Rule 29, the district court undertook to determine whether the government proved any predisposition and found it presented no evidence to establish that element. (Appendix A, pages A-16 to A-32) See, United States vs. Groll, 992 F.2d 755, 759 (7th Cir. 1993), United States vs. Perez-Leon, 757 F.2d 866, 871 (7th Cir.), Gonzalez vs. United States, 474 U.S. 831 (1985), United States vs. Rivera-Espinoza, 905 F.2d 156, 158 (7th Cir. 1990).

Entrapment was established as Mr. Ghanayem showed (first) that he was induced to commit the offense and (second) the government could not prove that he was disposed to commit the offense prior to being approached by the government. See, Jacobson vs. United States, 112 S. Ct. at 22 1540. In Ghanayem's case both at trial and on appeal inducement was not in issue.

Predisposition, is not a purely mental state, the state of being willing to swallow the government's bait. (United States vs. Hollingsworth, 27 F.3d. 1196 at 1200). This court has stated, "the defendant must be so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime some criminal would have done so." Further, "it is different when the defendant is not in a position without the government's help to become involved in illegal activity for the government 'may not provoke or create a crime, then punish the criminal, its creature'." (Hollingsworth 27 F.3d at 1200, citing Casey vs. United States, 276 U.S. 413, 423, 48 S.Ct. 373, 376, 72 L.Ed. 632 (1928). Ghanayem was not proven by the government to be a man of experience or

occupation to be a cocaine trafficker. The court of appeals' conclusion that he had a reputation or character for narcotic trafficking is belied by the record. He is a 29-year old auto repairman. He'd been an auto mechanic for 10 years when by happenstance -- because the DEA had targeted his cousin Mazen Shunnarah as a cocaine trafficker -- he was approached by the CI and DEA Agent Grant. Absent from the proof at trial -- and the Seventh Circuit's opinion -- is any evidence that he had ever before engaged in such activity. (See Appendix A, page 11)

Instead of predisposition evidence, the decision of the Court of Appeals focuses on defendant's acts and words **after** he had been entrapped by the efforts of the undercover agent to reach the questionable conclusion that Mr. Ghanayem possessed a "reputation"

and "character" for narcotics. In Jacobson vs. United States, 112 S.Ct. 1535 at 1541, this court ruled that the government must prove predisposition as independent -- not the product of the attention the government directed at the defendant. See Sorrells vs. United States, 287 U.S. 435 at 442 and Sherman vs. United States, 356 U.S. 369 at 372. The present court of appeals decision blindly ignores this fundamental, settled principal of law. At this case's inception, Grant and the CI went to the 1-2-3 Club in Chicago because the CI had told Grant that it was a known hangout for criminals. The main target of the investigation was Mazen Shunnarah. There, by pure accident, the CI saw Khadir and struck up a conversation with him. They talked only about auto repair. The next contact with Ghanayem took place at his shop where Grant,

acting in an undercover capacity, and the CI, went there to meet with him in an effort to have him contact his cousin Shunnarah. The defendant discussed automobile repair, but the agent and CI steered the conversation to narcotics. The defendant told him that his cousin had moved to Lexington, Kentucky. He had not spoken with Shunnarah for six months.

Then, and in all subsequent times, each time the defendant tried to discuss the repair of the agent's car, Grant repeatedly turned the discussion to narcotics. While, according to Grant, the defendant would attempt to arrange a cocaine transaction and would make telephone calls, the government's tape recordings, transcripts and the testi-- mony of the defendant established that Ghanayem had no prior experience nor inclination to engage in a cocaine deal. (Appen

dix A, page A-25)

The district court examined the record and ruled Grant's testimony could not be taken in a vacuum considering the taped conversations introduced by the government. These tapes, which the government introduced as authentic, undercut Agent Grant's testimony regarding predisposition on the part of Ghanayem. The May 7, 1993, tape recording proved that after discussing repairs on the car Grant broached the subject of cocaine (Gov't. Exhibit 9 at 4), to which defendant stated that he had been unable to reach Shunnarah when he stammered:

> "He never called me, a was wanting a...wasn't able to get a hold of me, he couldn't get a hold of it."

When the defendant turned the discussion back to car repairs, Grant turned it back to cocaine, asking "Do you know anyone else [other than Shunnarah] that might be inter-

ested?" (Government Exhibit 9 at 6), to which the defendant replied, "not off hand. Only one person. You..this is the only person that I know, that you know, he's a he's a close friend of mine..." (Government Exhibit 9 at 6). In the view of the district court, this established that Ghanayem was not an experienced drug dealer and was without connections to his cousin's drug business. Rather, Khadir Ghanayem was a confused and ambivalent person, in over his head. The government tape recordings disproved that the defendant promptly accepted Grant's offer to arrange a drug deal. (Appendix A, pages A-24 to A-32)

The tape recorded conversations demonstrated that on two occasions Ghanayem deflected drug conversations back to the car repairs, but Grant repeatedly turned the discussion back to cocaine. Ghanayem was

clearly unable or unwilling to contact Shunnarah. The district court thus ruled that he would not have done so without the repeated urging of Agent Grant. Significantly, Ghanayem did not call the informant or Agent Grant in any of the intervening weeks between April and May. Judge Conlon concluded that it was only after Agent Grant overcame defendant's reluctance that Ghanayem finally followed through by contacting his cousin to set up a deal. (Appendix A, pages A-28 to A-29)

On May 12, 1993, when Grant visited the shop, Ghanayem discussed car repairs, but Grant again brought up the subject of drugs. In this and subsequent meetings, defendant, having been overcome by the agent, discussed the possibility of multiple deals and requested a $1000.00 commission on the transaction. While a reasonable jury could

conclude that Ghanayem was a willing participant in the drug conspiracy after May 12, this occurred over two months after many discussions. While defendant ultimately became a participant in the drug deal, that does not support a reasonable inference that he was predisposed to participate. (See United States vs. Evans, 924 F.2d 714, 716 (7th Cir. 1991)). The court of appeals use of post-entrapment words and conduct to establish predisposition is contrary to law. In Jacobson vs. United States 112 S.Ct. 1535, 118 L.Ed.2d 174 (11992), the defendant was prosecuted for buying child pornography. The pornography was furnished to him by government agents, who were aware of his interest in kinky sex because he had brought magazines that catered to this interest. Significantly, Jacobson, like Khadir Ghanayem, at no time exhibited a reluctance to

purchase such magazines provided to him by agents of the government. The facts of Jacobson reveal that the government, as here, did not offer Jacobson any inducements to buy pornographic magazines or threaten him with harm if he failed to buy them. This court found that while the evidence indicated a generic inclination to act within a broad range, not all of which is criminal, such does not prove nor does it establish predisposition. This court ruled:

> "Petitioner's ready responses to these solicitations cannot be enough to establish beyond a reasonable doubt that he was predisposed prior to the government acts intended to create predisposition, to commit the crime of receiving child pornography through the mail...the evidence that Petitioner was ready and willing to commit the offense came only after the government had devoted two and one half years to convincing him that he had or should have the right to engage in any behavior that proscribed by law" (112 S.Ct at 1543).

Here, the district court, applied the above standard and that of the Seventh Circuit

(United States vs. Hollingsworth, 27 F.3d. 1196 (7th Cir. en banc. 1994)) in ruling that law enforcement officials went too far when they "implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." (Sorrells vs. United States, 287 U.S. 435 at 442). The present decision stands in conflict with such precedent. Petitioner was entrapped to commit a crime which without government inducement would never have committed.

CONCLUSION

The petition for writ of certiorari should therefore be granted.

Respectfully submitted,

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